DAY PITNEY LLP
Joshua W. Cohen (JC-2978)
7 Times Square
New York, NY 10036
Telephone: (212) 297-5800

One Audubon Street
New Haven, CT 06511
Telephone: (203) 752-5000
Facsimile: (203) 752-5001
Email: jwcohen@daypitney.com

Attorneys for Defendants Scott Gottlieb and Robin Gottlieb

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff-Applicant, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	Adv. Pro. No. 08-01789 (BRL) SIPA LIQUIDATION (Substantively Consolidated)
In re: BERNARD L. MADOFF, Debtor.	
IRVING H. PICARD, Trustee for the Liquidation Of Bernard L. Madoff Investment Securities LLC, Plaintiff, v. SCOTT GOTTLIEB, individually and as a joint tenant; and ROBIN GOTTLIEB, individually and as a joint tenant, Defendants.	Adv. Pro. No. 10-04715 (BRL)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO WITHDRAW THE REFERENCE

Defendants Scott Gottlieb and Robin Gottlieb (the "Gottliebs"), as beneficiaries of their joint account, respectfully submit this memorandum of law in support of their motion pursuant to 28 U.S.C. § 157(d), Federal Rule of Bankruptcy Procedure 5011 and Local Rule of Bankruptcy Procedure 5011-1 for mandatory withdrawal of the reference of this adversary proceeding from the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court").

STATEMENT

The complaint in the above-captioned adversary proceeding (a copy of which is attached as Exhibit 1 to the accompanying Declaration of Joshua W. Cohen ("Cohen Decl.")) is one of more that 900 adversary complaints brought by Irving Picard, as trustee for the liquidation of Bernard L. Madoff Investment Securities LLC ("BLMIS" or "Madoff Securities"), against innocent investors in BLMIS who allegedly were "net winners." For twelve years, the Gottliebs maintained the joint account with BLMIS which is the subject of this adversary proceeding. The Complaint alleges that the Gottliebs received $1,000,000 in payments or other transfers. (Compl. ¶ 37) Of that amount, the Complaint alleges that $255,000 constitute preference transfers paid as a return of principal in the 90 days prior to the filing of the SIPC proceeding (the "Preference Transfers"). (*Id.*) It further alleges that the remaining $745,000 of that amount represents fictitious profits paid either: (1) in the two years before the filing under section 548(a) of the Bankruptcy Code (the "Two Year Transfers"); or (2) in the six years before the filing under section 544(b) of the Bankruptcy Code and applicable state law (the "Six Year Transfers"). (Compl. ¶ 38)

On the basis of these allegations, the Trustee asserts seven claims against the Gottliebs under various provisions of SIPA and the Bankruptcy Code. Count One asserts a claim to recover the Preference Transfers under section 547(b) of the Bankruptcy Code, which permits a trustee to avoid transfers made within 90 days before the petition date, to or for the benefit of a creditor, for or on account of an antecedent debt owed by the debtor, that enables such creditor to receive more than such creditor would receive if: (1) the case were a case under chapter 7; (2) the transfer had not been made; and (3) such creditor received payment of such debt to the extent provided by the Bankruptcy Code. Count Two asserts a claim to recover the Two Year Transfers under Section 548(a)(1)(A) of the Bankruptcy Code, which permits a trustee to avoid transfers made within two years before the petition date "with actual intent to hinder, delay or defraud any entity to which the debtor was or became, on or after the date that such transfer was made . . ., indebted." Count Three asserts a claim to recover the Two Year Transfers under the constructive fraud provision of Section 548(a)(1)(B) of the Bankruptcy Code. Counts Four through Seven assert claims to recover the Six Year Transfers under Section 544(b) of the Bankruptcy Code and various provisions of the New York Uniform Fraudulent Conveyance Act, New York Debtor and Creditor Law §§ 273-79.

ARGUMENT

I. THE COURT SHOULD WITHDRAW THE REFERENCE TO RESOLVE CERTAIN ISSUES IN THESE CASES.

28 U.S.C. § 157(d) provides for mandatory withdrawal of the reference by the District Court where the resolution of the case or proceeding referred to the Bankruptcy Court requires substantial consideration of both the Bankruptcy Code and other federal laws regulating organizations or activities affecting interstate commerce. As the District Court already has found in a series of similar cases, significant and novel questions of federal law – in particular, the interplay between the Bankruptcy Code and federal non-bankruptcy law, including SIPA and the

federal and state securities laws mandate withdrawal of the reference. *See Picard v. Flinn Investments, LLC*, Civ. No. 11-5223, 2011 U.S. Dist. LEXIS 136627 (S.D.N.Y. Nov. 29, 2011).

In that decision, the District Court withdrew the reference in a number of cases substantially similar to this proceeding to decide the following issues:

(1) whether the Trustee may, consistent with non-bankruptcy law, avoid transfers that Madoff Securities purportedly made in order to satisfy antecedent debts;

(2) whether, in light of the District Court's decision in *Picard v. Katz*, Civ. No. 11-3605 (JSR), 2011 U.S. Dist. LEXIS 109595 (S.D.N.Y. Sep. 27, 2011), Section 546(e) of the Bankruptcy Code applies, limiting the Trustee's ability to avoid transfers;

(3) whether, after the United States Supreme Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011), final resolution of claims to avoid transfers as fraudulent requires an exercise of "judicial power," preventing the bankruptcy court from finally resolving such claims; and

(4) whether, if the Bankruptcy Court cannot finally resolve the fraudulent transfer claims in this case, it has the authority to render findings of fact and conclusions of law before final resolution. 2011 U.S. Dist. LEXIS 136627, at * 28.

All of the above issues are present in this case and thus, for the same reasons set forth in *Picard v. Flinn Investments*, the Court should withdraw the reference for the purpose of deciding the above issues.

CONCLUSION

The Court should withdraw the reference, solely for the purpose of deciding the above issues.

Dated: New York, New York
April 2, 2012

DAY PITNEY LLP

By: /s/ Joshua W. Cohen

Joshua W. Cohen
7 Times Square
New York, NY 10036

One Audubon Street
New Haven, CT 06511
Telephone: (203) 752-5000
Telecopier: (203) 752-5001
E-mail: jwcohen@daypitney.com

Attorneys for Defendants Scott Gottlieb and Robin Gottlieb